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No. 90-1352

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1990

MEXICAN AMERICAN BAR ASS'N OF TEXAS, *et al.*,
*Appellants,*

*vs.*

STATE OF TEXAS,
*Appellee.*

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS*

## BRIEF FOR APPELLEE STATE OF TEXAS

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## BRIEF FOR APPELLEE STATE OF TEXAS
## (Motion to Dismiss or, alternatively, to Affirm)

Filed pursuant to Rule 18.6 of the Rules of the Court, this brief is a motion to dismiss the United States as a party in this Court, to dismiss the appeal of the private appellants, and to affirm the district court's judgment as to the private appellants Mexican-American Bar Association of Texas, *et al.* ("MABA") . The brief is filed on behalf of the State of Texas ("state" or "Texas"), which was the sole state defendant in MABA's action.[1]

### OPINIONS BELOW

The opinion of the three-judge district court is reported at 755 F.Supp. 735 (W.D. Tex. 1990) and reproduced beginning at page 1 of the appendix to MABA's Jurisdictional Statement ("J.S. App."). MABA is partially incorrect in characterizing it as a "2-1 opinion and dissent[.]" MABA Juris. St. 2. The three members of the district court unanimously rejected part of MABA's challenge.

### JURISDICTION

The Court does not have jurisdiction over the appeal of the United States, which is neither an appellant nor a party before the Court. *See* Part I, *infra*. The Court also does not have jurisdiction over the appeal of MABA, which lacks standing to invoke

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[1] The Governor and Secretary of State of Texas were named as official-capacity defendants in the action filed by the United States. If the Court accords party status to the United States in this appeal, then this brief is filed on behalf of the Governor and Secretary of State of Texas, too.

the protections of section 5 of the Voting Rights Act. See Part II, *infra*.

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

In addition to section 5 of the Voting Rights Act, 42 USC 1973c, this case involves several sections from the Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as amended, promulgated by the United States Department of Justice ("DOJ") and codified at 28 C.F.R. Part 51 (1990).

**§ 51.1(a)(2):**

> (a) Section 5 . . . prohibits the enforcement in any [covered] jurisdiction . . . of any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on the date used to determine coverage, until . . . :
>
> . . . .
>
> (2) It has been submitted to the Attorney General and the Attorney General has interposed no objection within a 60-day period following submission.

**§ 51.4(b):**

> Section 5 requires the preclearance of changes affecting voting made since the date used for the determination of coverage. . . . November 1, 1972.

**§ 51.9(a):**

The Attorney General shall have 60 days in which to interpose an objection to a submitted change affecting voting.

**§ 51.21:**

Changes affecting voting should be submitted as soon as possible after they become final.

**§ 51.22:**

The Attorney General will not consider on the merits: (a) Any proposal for a change affecting voting submitted prior to final enactment . . .

**§ 51.37(a):**

If a submission does not satisfy the requirements of § 51.27, the Attorney General may request from the submitting authority any omitted information considered necessary for the evaluation of the submission. The request shall be made by letter and shall be made within the 60-day period . . .

**§ 51.39 (a):**

When a submitting authority provides documents and written information materially supplementing a submission . . . the 60-day period for the original submission will be calculated from the receipt of the supplementary information . . .

## STATEMENT OF THE CASE

### Outline of the challenge and its outcome below

This case is about claims that two Texas statutes -- one new and one old -- adding judgeships to the existing Texas district judge system are inoperative because they never were precleared within the meaning of section 5 of the Voting Rights Act. The new statute, S.B. 1379, became Texas law in 1989, and created fifteen new state district judgeships allocated among thirteen counties. The old statute, S.B. 515, became Texas law in 1971, and created two new state district judgeships in Travis County, Texas.

By a two-to-one vote, the district court held that S.B. 1379 had been precleared by operation of law due to the Attorney General's failure to interpose an objection within the applicable 60-day deadline. The district court unanimously held that S.B. 515 was not subject to preclearance because it was enacted before November 1, 1972, the earliest section 5 coverage date for Texas.

### Judgeships created by the two statutes

*New statute*

S.B. 1379 created fifteen judicial districts, sitting as follows:

363rd in Dallas County;
364th in Lubbock County;
365th in Dimmitt, Maverick, and Zavala counties;
366th in Collin County;
367th in Denton County;
368th in Williamson County;

369th in Anderson and Cherokee counties;
370th in Hidalgo County;
371st-376th in Tarrant County; and
377th in Victoria County.

J.S. App. 51a-56a. The Texas House passed it on May 27, 1989, the Texas Senate passed it on May 28, 1989, and the Governor signed it on June 14, 1989.

All the new judgeships except those in Tarrant and Victoria counties became effective on September 1, 1989. Two Tarrant County judgeships, the 371st and the 372nd judicial districts, became effective on September 1, 1990. The Victoria County judgeship became effective upon the occurrence of specified conditions, which had been met before the time of trial.

Four Tarrant County judgeships, the 373rd-376th judicial districts, were to become effective on September 1, 1991, but only upon the occurrence of specified conditions which had not been met by the time of trial. For simplicity, these four judgeships will be termed the "nascent Tarrant County judgeships."

*Old statute*

S.B. 515 created the 200th and 201st judicial districts, sitting in Travis County. The Texas Senate passed it on May 11, 1971, the Texas House of Representatives passed it on May 29, 1971, the Governor signed it on June 1, 1971, and it became effective 90 days later, on August 30, 1971. J.S. App. 58a. Under the act, the 200th judicial district was to become effective September 1, 1971, and the 201st judicial district was to become effective January 1, 1973. *Id.*, at 57a.

**Proceedings below**

MABA initiated the lawsuit in late October, 1990, challenging all the judgeships created by S.B. 515 and S.B. 1379, except the four nascent Tarrant County judgeships.[2] It sought an injunction prohibiting further implementation of those statutes until they had been precleared and prohibiting the eleven judges elected to S.B. 1379-created judicial posts from taking office.

Then, only a few minutes before 7:00 p.m. on November 5, 1990, the night before the general election day conclusion to the election for the judgeships (as well as many other state and county offices), the Attorney General, through his Assistant Attorney General for Civil Rights, telecopied a letter to the Texas Secretary of State's office, objecting to creation of the fifteen S.B. 1379 judgeships. J.S. App. 80a-84a. On November 20, 1990, the Attorney General telecopied another letter to Texas, modifying the November 5th objection letter and narrowing the objection to nine judgeships, those being the ones in Dallas, Lubbock, Victoria, and Tarrant counties. J.S. App. 85a-87a.

On November 27, 1990, the United States filed a section 5 action in a different division of the Western District of Texas, challenging the nine S.B. 1379 judgeships to which the Attorney General had objected. It did not challenge the two judgeships created in 1971 by S.B. 515.

On December 4, 1990, the district court ordered consolidation of the MABA and United States actions. J.S. App. 41a. The section 5 aspects

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[2] In addition to the section 5 claim, MABA filed an intentional discrimination claim under the United States Constitution. That claim has been stayed.

of the consolidated cases were tried to the three-judge district court on December 12, 1990.

**Decision and issues decided below**

At the time the actions were submitted to the district court for decision on the section 5 issues, MABA and the United States had overlapping, but not identical, challenges: (a) only MABA challenged the 200th and 201st judicial districts in Travis County; (b) only the United States challenged the four nascent Tarrant County judgeships; and (c) both challenged five judgeships -- the 363rd in Dallas County, the 364th in Lubbock County, the 377th in Victoria County, and the 371st and 372nd in Tarrant County.

The three-judge district court issued its opinion on December 26, 1990, and its final judgment on the section 5 claims on January 25, 1990. It rejected all claims by both MABA and the United States.

**The appeals**

MABA filed a timely Amended Notice of Appeal on behalf of the "Mexican American Bar Association (MABA) et al." J.S. App. 95a.[3] It also filed a timely Jurisdictional Statement with the Court to perfect its appeal.

The United States took a different approach. It filed a timely Notice of Appeal, but, before the deadline for its Jurisdictional Statement, moved the district court to dismiss its appeal. The United States did not file a Jurisdictional Statement, but instead filed a "Brief for the United States" under the

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[3] This form of notice makes MABA itself the only appellant in this case. *See infra* 12-13.

docket number of the MABA appeal. On April 9, 1991, the district court entered an order concluding that the United States "has no appeal in the Supreme Court" and that the pending United States motion to dismiss its appeal was moot.

## SUMMARY OF ARGUMENT

There is no appellant before the Court with standing to invoke the protections of section 5 of the Voting Rights Act. The United States has abandoned the role of appellant. Additionally, the United States is not a party in the MABA appeal. It was not a party in MABA's action below and, therefore, it is not a party in MABA's appeal here. The fact that the United States was a party in a separate action below which was consolidated with MABA's action does not salvage party status for the United States. Consolidated cases retain their separate existence, and the parties in one do not become parties in the other. This principle was acknowledged by the United States and binds the United States here.

MABA's appeal of the judgment in its action lacks the specificity to give appellant status to any of the seventeen parties who were private plaintiffs below except MABA itself. The notice of appeal specifies only MABA as an appellant and refers to the others with the insufficiently specific "*et al.*"

As the only appellant here, MABA must have standing if there is to be a justiciable case or controversy before the Court. It does not. There was absolutely no evidence about MABA before the trial court. Furthermore, the broad allegations in MABA's complaint about its interests would be insufficient to establish its standing even if they had been proven. The zone of interest sought to be protected by section 5 is the interest of minority

voters, and MABA's allegations do not suggest that it is a minority voters' rights organization.

Thus, there is no case or controversy before the Court. The appeal accordingly should be dismissed.

Even there is a case or controversy before the Court, the questions presented are too insubstantial to warrant the Court's plenary review. Instead, the district court's judgment should be summarily affirmed both as to the new judgeships challenged and the old judgeships challenged.

Covered changes submitted to the Attorney General for preclearance are deemed precleared by operation of law if the Attorney General does not interpose an objection within 60-days, including any appropriate extensions of time. The facts found by the district court demonstrate that, as to the new challenged judgeships, the Attorney General missed his deadlines twice, not just once. Engaging in the fact-intensive consideration of whether the district court clearly erred in so concluding is an insubstantial issue for the Court. The district court properly found that the new judgeships were precleared by operation of law

The old judgeships, created through a Texas law enacted twenty years ago (and a year before the earliest applicable date of section 5 coverage of Texas), simply are not subject to section 5's preclearance requirements. Both the plain language of section 5 and the Attorney General's own formal procedures for administering his section 5 preclearance responsibilities focus on enactment as the key determinative date for coverage. The issue seems clearly established and, even if there were some room for debate, its current importance to the administration of the Voting Rights Act is virtually nil. The issue is not one that is likely to arise again.

## ARGUMENT

### I.

### THE UNITED STATES SHOULD BE DISMISSED BECAUSE IT IS NEITHER AN APPELLANT ON ITS OWN NOR A PARTY IN MABA'S APPEAL

The United States has not perfected its own appeal of the district court's final judgment. It did not comply with the requirements of Rule 18.3 of the Rules of the Court by timely filing a statement as to jurisdiction. Although untimely performance under the rule is not jurisdictional, *see Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 446 n.4 (1974), the fact remains that the United States still is not an appellant here, having abandoned the role. It also is not a party in this case, although the reason is more complex than the reason it is not an appellant.[4]

Rule 18.2 of the Rules of the Court deems all parties "to the proceeding" in the district court to be parties to the appeal. One need not be an appellant

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[4] Why the United States would want to be a party but not an appellant is somewhat perplexing. One possible explanation is that such procedural legerdemain would permit it to remain an active participant in the case without facing potentially adverse consequences flowing from one of the major perils of being an appellant in cases on the Court's appellate docket. The peril is a summary affirmance; the consequence is the binding, albeit limited, authority of such an affirmance. The Court has directed lower courts that summary affirmances are authority for the "specific challenges presented in the statement of jurisdiction" but rejected by the Court. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Because the United States filed no jurisdictional statement here, *it* technically has presented the Court no issues which might become albatrosses around the United States' neck in future section 5 litigation if the Court summarily affirms the district court judgment -- as Texas urges it to do.

to be a party before the Court. *Diamond v. Charles*, 476 U.S. 54, 63 (1986) (construing and explaining the predecessor to Rule 18.2). This principle, however, does not obviate the need for at least one party to perfect an appeal from the district court. *See, e.g., Id.*, at 63 n.14 (rule "does not provide a means to obtain review in the absence of the filing of a notice of appeal by a proper party").

In this instance, MABA perfected an appeal of its case to the Court; however, MABA's case below was a different one than the United States' case below. Thus, the perfection of MABA's appeal does not constitute the perfection of an appeal from the United States' case below.

MABA's case and the United States' case were separate cases from their inception, filed in different divisions of a federal district. Even though they were consolidated, they remained separate cases from which the perfection of separate appeals was necessary:

> [C]onsolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another.

*Johnson v. Manhattan Ry.*, 289 U.S. 479, 496-97 (1933); *see also Alfred Dunhill of London v. Republic of Cuba*, 425 U.S. 682, 735 (1976) (dissenting opinion).

A leading treatise on federal courts concludes that "actions do not lose their separate identity because of consolidation." 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2382, at 255 (1977). The United States itself conceded this point when it acknowledged that "[c]onsolidated cases retain their separate identities[.]" U.S. Memorandum in Support of Motion to Consolidate, at 3 n.1 (Nov. 27, 1990).

The United States was the only losing party in *its* action; it was not a party to MABA's action. Its failure to perfect an appeal from the final judgment in its action means that it is before the Court neither as an appellant nor as a party. Thus, it should be dismissed from this action.

A consequence of dismissal of the United States is that the district court judgment is final and binding in its determination about the four nascent Tarrant County judgeships. They have been precleared under the Voting Rights Act, regardless of the Court's disposition of the remainder of the appeal.

## II.

## MABA'S APPEAL SHOULD BE DISMISSED BECAUSE MABA, THE ONLY APPELLANT, DID NOT ESTABLISH STANDING TO BRING A CHALLENGE UNDER SECTION 5 OF THE VOTING RIGHTS ACT

### MABA is the only appellant among the private plaintiffs

While the Court's rule that one may be a party even though one is not an appellant does not impart party status to the United States under the circumstances of this appeal, it conceivably could salvage party status for the sixteen parties who were private plaintiffs with MABA.

The problem, though, is the *Diamond v. Charles* requirement that there me at least one appellant with standing to bring the case to the Court. 476 U.S. at 62-64. Due to the way MABA framed its amended notice of appeal, it is the only appellant. The other sixteen private plaintiffs below are not.

The reason is that the third sentence of Rule 18.1 requires that the notice of appeal "specify the

parties taking the appeal[.]" This requirement parallels the specificity requirement for notices of appeal in Rule 3(c) of the Federal Rules of Appellate Procedure.

Under Rule 3(c), the "*et al.*" designation in a notice of appeal is insufficient to confer jurisdiction over the appeal of a party who is not specifically named. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). The language of the specificity requirement of Rule 18.1 being the same, the application of the *Torres* specificity rule is the same in appeals to this Court as it is in appeals to the circuit courts. Thus, MABA, as the only specified appellant, is the only appellant.[5]

**MABA lacks standing**

With MABA as the only appellant before the Court, *Diamond v. Charles* requires a determination of whether it has presented the Court with a case or controversy to which the sixteen private plaintiffs may be parties. MABA does not present a case or controversy here because, on the facts pleaded and developed below, it lacks standing to lodge a challenge under section 5 of the Voting Rights Act.

MABA's original complaint contained only a one-sentence factual allegation about MABA. It alleged in paragraph 3:

> The MEXICAN AMERICAN BAR ASSOCIATION (MABA) is a state wide organization of attorneys who have a particular interest in the concerns of the

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[5] The Fifth Circuit recognizes an exception to the strict application of Torres when a class has been certified. *See Rendon v. AT&T Technologies*, 883 F.2d 388, 398 n.8 (5th Cir. 1989). The exception would be inapplicable here because, though a class had been alleged, none was certified.

> minority population of the State of Texas. Although most of its members are Hispanic, the Mexican American Bar Association is open to all attorneys in the State of Texas.

Texas did not admit this averment in its answer; no evidence was introduced at trial regarding MABA; and the district court made no findings regarding MABA. Thus, MABA has not established standing.

Even were the complaint's allegations taken as true, MABA would lack standing under section 5 of the Voting Rights Act. We may assume for purposes of argument that MABA and its members[6] meet the constitutional standing requirement of injury in fact, *see, e.g., Allen v. Wright*, 468 U.S. 737, 751 (1984). The question remains whether MABA meets the statutory standing requirement, which requires it to fall within the zone of interests sought to be protected by the statutory provision whose protection it invokes. *See, e.g., Lujan v. National Wildlife Federation*, 110 S.Ct. 3177, 3186 (1990).

Section 5 protects the rights of minority voters,[7] not minority lawyers or lawyers with a broad, ill-defined interest in minority concerns. The latter two categories simply do not fall within the zone of interests sought to be protected by the preclearance requirements of section 5.

There is no reported case precisely on point. The closest authority is a court of appeals case which held that an unsuccessful minority candidate lacked

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[6] An organization may have standing on its own or through its members. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977).

[7] In his closing argument before the district court, MABA's attorney made the point. "*Section 5 protects the rights of the minority voters.* It does not protect the rights of minority incumbents." Tr. 147 (emphasis added).

standing to bring a challenge under section 2 of the Voting Rights Act to the local voting system under whose auspices he lost a political contest. *See Roberts v. Wamser*, 883 F.2d 617 (8th Cir. 1989).[8] The basis for the court's holding is that the purpose of the Voting Rights Act is to protect minority voters. *Id.*, at 621.[9]

The principle determinative of *Roberts v. Wamser* is consistent with the Court's application of the principle of statutory standing: requiring a complainant to come within the zone of interests protected by the statutory provision at issue. MABA does not, and, therefore, it lacks standing. Because the only appellant lacks standing, there is no "case" before the Court, and the action should be dismissed.

## III.

### THE ISSUES ABOUT THE TWO BILLS -- S.B. 1379 AND S.B. 515 -- WHICH ARE PRESENTED FOR REVIEW ARE INSUBSTANTIAL AND DO NOT WARRANT PLENARY REVIEW BY THE COURT

The questions presented are insubstantial and do not warrant plenary review by the Court. Instead,

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[8] *Compare LULAC v. Clements*, 923 F.2d 365, 367 n.1 (5th Cir. 1991) (en banc) (undertaking no analysis of the question in a voting rights context, but imparting defendant-intervenor standing to an incumbent state district judge in her personal capacity and citing the earlier panel decision in the same case, *LULAC v. Clements*, 884 F.2d 185, 188 (5th Cir. 1989), which had held that incumbent judges have no legally cognizable interest in a voting rights case in their official capacity).

[9] In the proceedings below, Texas relied on *Roberts v. Wamser* to oppose the personal-capacity intervention of several state district judge incumbents as defendants. The district court, with one judge dissenting, cited no authority but granted the personal-capacity interventions. Order of Dec. 4, 1990.

the judgment of the district court should be summarily affirmed both as to the S.B. 1379 judgeships and the S.B. 515 judgeships.

**History of judicial preclearance in Texas**

The 1975 amendments to the Voting Rights Act, Pub. L. No. 94-73, 89 Stat. 400, first brought Texas under section 5's preclearance requirements. November 1, 1972, became the touchstone date. Section 5 required Texas to obtain preclearance for any covered voting matter[10] which it "enact[ed] or [sought] to administer" if it was different from one "in force or effect" on November 1, 1972.

As demonstrated by Texas Exhibit 3, Texas submitted more than 120 new judgeships to the Attorney General for preclearance from the time it came under section 5 coverage until S.B. 1379. The Attorney General never objected; all were precleared.

**S.B. 1379 judgeships**

*First 60-day period*

Texas submitted S.B. 1379 to the Attorney General for preclearance on February 13, 1990. The Attorney General's 60-day deadline for interposing an objection was April 16, 1990. Between February 13th and April 16th, the Attorney General made no written request for more information from Texas.

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[10] Major questions about whether the changes challenged here are covered never need to be reached in this case if the district court judgment is affirmed. Among these major questions would be whether section 5 reaches judges, whether section 5 applies to the mere addition of judgeships, and whether any of these legal principles apply retroactively to judgeships created in 1971.

During the same 60-day period, Texas submitted no further material, written information, or documents to the Attorney General other than a telecopy on March 20th of two sections of the Texas Constitution which had been precleared by the Attorney General less than five years earlier.[11] J.S. App. 8a-9a.

Nearly a month later, just nine days before the 60-day deadline, the Attorney General sent Texas a letter announcing that the information effectuated an extension of the objection deadline to May 22, 1990. The letter said nothing about the materiality of the information. J.S. App. 9a. In fact, it did not even specify what the information was.

The district court determined that the telecopied information was not a material supplemental submission extending the 60-day period for the Attorney General to interpose an objection. J.S. App. 10a. The basic reasoning was that the telecopy was of "readily available provisions" to which the Attorney General already had given his section 5 attention.

*Second 60-day period*

During the second 60-day period, from March 23rd until May 22nd, the Attorney General again did not submit any written requests to Texas for more information. Texas again provided only one document to the Attorney General. On May 16th, Texas requested the Attorney General to consider the Fifth Circuit's decisions in an important section 2 voting rights case. J.S. App. 70a-71a.[12]

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[11] The two provisions, §§ 7 and 7a of article 5, outline basic rules for Texas district judge elections.

[12] The case is *LULAC v. Clements*, now before the Court in the consolidated cases of *Houston Lawyers' Ass'n v. Attorney General*

Three weeks earlier, the Attorney General, through the Assistant Attorney General for Civil Rights (the same official through whom he acted in considering Texas's S.B. 1379 submission, *see* 28 C.F.R. § 51.3), filed a Fifth Circuit amicus curiae brief in *LULAC v. Clements*. The brief, put in evidence below, reflects close familiarity with the LULAC proceedings and record.

Notwithstanding the fact that the Attorney General had been aware of the matter for at least a month and a half, he wrote Texas on May 18th, a scant four days before the already extended deadline, that the objection deadline had become July 16th.

The district court determined that the Texas letter (asking the Attorney General to do no more than pay attention to federal case law developments) was not a material supplemental submission extending the 60-day period for the Attorney General to interpose an objection. J.S. App. 10a. The court reasoned that the letter did not supplement anything, especially given the fact that "DOJ was aware of, and was a part of, every phase of the *LULAC* litigation during the time when S.B. 1379 was under submission." J.S. App. 12a.

*Insubstantiality of the factual and legal issues presented to the Court*

There is nothing momentous in the district court's finding that S.B. 1379 was precleared by operation of law during either the first or the second 60-day period. It simply measures the facts here against the Attorney General's regulations for administering section 5 and concludes that nothing happened during either period which could

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*of Texas*, No. 90-813, and *LULAC v. Attorney General of Texas*, No. 90-974.

reasonably be interpreted as warranting the Attorney General's unilateral extensions of time.

The district court's conclusion is precisely in line with the purpose behind section 5's creation of the alternate route of administrative preclearance through the Attorney General. This alternate route is supposed to provide an expeditious avenue of resolution so that states can either get on with the business of implementing their laws or know that they cannot. *Morris v. Gressette*, 432 U.S. 491, 503-04 (1977).[13]

Permitting the Attorney General to use either of the flimsy excuses he used here to drag out the process undercuts the law's purpose in providing the option. Enforcing his own regulations serves the law's purpose. Summarily affirming the district court's S.B. 1379 decision will remove the unnecessary cloud that has hovered for too long over the five remaining challenged judgeships due to the unnecessary and unjustified delays of the Attorney General. That is the only great principle at stake here.[14]

**S.B. 515 judgeships**

The law creating the two Travis County judgeships was enacted four years before Texas came

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[13] In words that strike a familiar chord here, the court in *Seamon v. Upham*, 536 F.Supp. 931, 937 n.3 (E.D. Tex. 1982 (3-judge court), discusses the Attorney General preclearance route as an expeditious alternative and chastises the Attorney General for "unseemly delay, inattention, and inactivity," as well as for failing to give "careful and detailed analysis" to Texas's submission.

[14] The United States demurely admits its waiver of the principal issue argued in its brief. U.S. Br. 9-10 (citing to part of an opinion by the Court which finds waiver in circumstances similar to those here).

under section 5 coverage and more than a year before the touchstone date of November 1, 1972. It is thus outside section 5's purview.

The very language of section 5 points to enactment as the determinative date for coverage here. Through the phrase "enact or seek to administer," the provision specifically looks to two different types of events -- enactment or the administration of enactments -- and requires their measurement against the situation as of November 1, 1972.

DOJ's formal procedures for administering section 5 also look to enactment as the critical event:

> The Attorney General will not consider on the merits: (a) Any proposal for a change affecting voting submitted prior to final enactment . . .

28 C.F.R. § 51.22. Another procedural rule stresses the need to submit covered changes "as soon as possible after they become final." 28 C.F.R. § 51.21.

The statutory recognition of these two very different types of events -- enactment and administration -- does not give the Attorney General a choice about which one he will use to measure whether there has been a change requiring preclearance. Instead, he must look to the law (that is, the enactment) first. If it is the same as the one in effect on November 1, 1972, the enactment does not require preclearance. Next, he must look to the administration of the unchanged law, or enactment. If the enactment's administration has changed since November 1, 1972 (through, for example, the movement of polling places), then preclearance of the administrative change is required.

Here, S.B. 515 is the enactment.[15] It was the same on November 1, 1972, as it was the day it was signed by the Governor of Texas. Thus, there was no change requiring preclearance. Furthermore, the administration of the law was the same on November 1, 1972, as it was on the day it was signed by the Governor. The appointive and electoral system for the two judgeships created by S.B. 515 did not change one iota during the period. Thus, there was no change here requiring preclearance.

The principle adopted by the district court is a simple one, furthering the purpose of the Act to have preclearance submissions made as early as practicable, *see* 28 C.F.R. § 51.21 (submit as soon as possible after finality). It also is consistent with the plain language of the Act ("enact or seek to administer"). Finally, it is a principle of little further practical use. The pressing problems of section 5 which require the Court's attention are not the arcana and anomalies of nearly two decades ago. That is precisely what the S.B. 515 question is, and it presents an eminently insubstantial question, unworthy of the Court's plenary review.

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[15] Looking to enactment as the critical date for S.B. 515 is consistent with the Attorney General's preclearance actions concerning S.B. 1379. He evaluated the four nascent Tarrant County judgeships and tried to deny preclearance to them. If something other than enactment were the crucial date, the Attorney General would have had to inform Texas that its submission of those four judgeships was premature. *Cf.* 28 C.F.R. § 51.22(a). His failure to take such action suggests that he thought the matter ripe for preclearance. If it was, then sixteen years ago S.B.515 did not require preclearance and now it does not either.

## CONCLUSION

The United States should be dismissed as a party in this appeal. This appeal should be dismissed because the only appellant, MABA, lacks standing to bring it.

If the Court reaches the matter, the judgment of the district court that the S.B. 1379-created judgeships were precleared by operation of law should be affirmed. The judgment that the two S.B. 515-created judgeships were not subject to the preclearance requirements also should be affirmed.

Respectfully submitted,

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